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ANN JOO STEEL BHD v. TENAGA NASIONAL BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
ABDUL WAHAB MOHAMED JC
[CIVIL SUIT NO: 22-274-2010]
22 AUGUST 2016

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LAND LAW: *Boundary – Determination of – Method of measurement – Deputy Director of Titles decided that boundary should be measured by Traverse Mark Method ('first decision') – Appeal to High Court against first decision – High Court ordered matter to be remitted to District Commissioner for Land Titles for determination of appropriate method – Deputy Director of Land Titles decided that boundaries land should be measured by High Water Mark Method ('second decision') – Whether second decision null and void – Whether High Court has jurisdiction to hear appeals against decision of Land Titles Appeal Board – Whether second decision superseded first decision*

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Prye (Penang) Syndicate Limited ('Prye') previously owned 245 acres of land ('Lot 78') based on the statutory land grant. The plan for Lot 78 showed that the boundary of land was determined on High Water Mark ('HWM'). The plaintiff subsequently purchased Lot 78 from Prye. The Pulau Pinang State Government allowed the first defendant's ('TNB') predecessor in title, Lembaga Letrik Negara to reclaim 48 acres of land adjacent to Lot 78. The Collector of Land Revenue Butterworth determined the boundary of Lot 78 based on Traverse Mark ('TM') as opposed to HWM. Aggrieved with the decision of the Collector of Land Revenue Butterworth, the plaintiff filed an application to the Director of Land Titles pursuant to s. 28(1) of the National Land Code (Penang and Malacca Titles) Act 1963 ('the Act') for the determination of the boundary of the land either by way of TM or HWM. The Deputy Director of Titles, dismissed the plaintiff's application and held that the land's boundary was to be determined by TM ('first decision'). The plaintiff then appealed under s. 15 of the Act against the decision of the Deputy Director of Land Titles to the Land Titles Appeal Board ('the Board'). The Board however dismissed the plaintiff's appeal. The plaintiff, therefore, appealed to the High Court against the decision of the Board on the points of law under s. 19 of the Act. The High Court Judge ('HCJ') allowed the plaintiff's appeal and ordered the case be remitted to the District Commissioner for Land Titles for an enquiry to be conducted to determine the boundary of the land ('the High Court order'). Pursuant to the High Court order, after conducting the enquiry, the Deputy Director of Land Titles decided that the boundaries of Lot 78 should be measured in accordance with the HWM ('second decision'). The first defendant contended that the second decision was null and void *ab inito* as there was already a decision by the Director of Land titles with regards to the boundary of the plaintiff's land which was final and conclusive *ie*, the first decision. In the circumstances, the plaintiff sought, *inter alia*, a declaration that the plaintiff had the legal title

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to Lot 78 and the boundary of the land was to be measured based on HWM. The parties agreed that the plaintiff' claim be determined pursuant to O. 14A and/or O. 33 r. 2 and 5 of the Rules of Court 2012 ('ROC') and under the inherent jurisdiction of the court. Therefore, the plaintiff filed an application *vide* encl. 51 pursuant to O. 14A r. 1 of the ROC 2012 and/or O. 33 r. 2 of the ROC to determine the questions of law, *to wit*, (i) whether the decision of the Deputy Director of Land Titles Penang (second decision) was final and conclusive; (ii) whether the second decision prevailed over and/or superseded the decision of the Deputy Director of Land Titles Penang (first decision) that the boundary of Lot 78 was to be measured based on TM; and (iii) whether the HCJ had jurisdiction to hear an appeal brought by the plaintiff against the decision of the Board.

Held (allowing plaintiff's claim with costs):

(1) The High Court order was made in open court and in the presence of all parties. It was not made by default or in the absence of the defendants. The matter was fully adjudicated. There was no indication that the HCJ lacked jurisdiction and/or exceeded jurisdiction in granting the said order. Further, the High Court order was drawn up, extracted and accordingly perfected and executed. In the circumstances, the court had no power under any application in the action to alter or vary a judgment after it had been entered and perfected. (para 32)

(2) There was no contravention of the Act as contended by the defendants. On the facts, the defendant was wrong in submitting that the High Court order was passed without jurisdiction. The HCJ was perfectly competent to entertain the appeal brought by the plaintiff. The parties without any objection, joined issue and went through the appeal upon merits on points of law. The defendant could not subsequently dispute his jurisdiction upon the ground that he lacked jurisdiction. (paras 34 & 35)

(3) The right of appeal against the decision of the Board or Director of Land Titles is provided by s. 19(1) of the Act. Taking the words of s. 19(1) of the Act, it is clear that an appeal does not lie on a question of fact but on a question of law. Therefore, there must be an error of law (point of law) complained of to enable the court to invoke s. 19 of the Act. In the circumstances, the High Court had done the right thing by remitting to the Director of Land Titles. (paras 37, 39, 41 & 43)

(4) The defendants failed to convince this court that the High Court order was a nullity on the ground of illegality. This court cannot set aside an order regularly obtained from another High Court of concurrent jurisdiction. This is an order of a superior court, thus one cannot attack its invalidity laterally by raising an objection to its invalidity in this proceeding for applying to have it set aside first. If it can be proven that the High Court order was on illegality then it can be set aside and the

doctrine of *functus officio* will not apply. In this case, since there was no element of illegality involved in granting the High Court order, the order could not be set aside as the court was *functus officio*. (para 51)

(5) The Deputy Director of Land titles, pursuant to the High Court's order, carried an enquiry and came out with decision that the boundaries of Lot 78, should be measured in accordance with the HWM (second decision). Therefore, the second decision supersedes the first decision. Since the appeal was allowed, the first decision could not be enforced. The Deputy Director in carrying out a fresh inquiry and in making the second decision had duly observed the High Court order. The Deputy Director of Land titles cannot ignore the High Court order and carry on enforcing the first decision as the Deputy Director of Land titles will be faced with contempt proceedings. (paras 53 & 54)

(6) The Deputy Director of Land Titles in carrying out the enquiry and coming up with the second decision did not act in excess of jurisdiction. The second decision was valid and it was done properly, validly and the Deputy Director of Land Titles had acted within the jurisdiction (as ordered by the High Court). Furthermore, in the absence of any appeal by the defendants as to the second decision to the Board, the second decision stood and enjoyed full legal effect. (para 55)

Case(s) referred to:

Ashbridge Investment v. Minister of Housing [1965] 3 All ER 371 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] 9 CLJ 1012 FC ***(refd)***

Gurcharan Kaur v. Rochi Silk Store [1959] 1 LNS 31 HC ***(refd)***

Kabushiki Kaisha Ngu v. Leisure Farm Corporation & Ors [2016] 8 CLJ 149 FC ***(refd)***

Muniandy Thamba Kaundan & Anor. v. Development & Commercial Bank Berhad & Anor [1996] 2 CLJ 586 FC ***(refd)***

Pengarah Tanah Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***

Tenaga Nasional Bhd v. Bandar Nusarajaya Development [2016] 8 CLJ 163 FC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 29

Electricity Supply Act 1990, s. 16(2)

Federal Constitution, art. 13(1)

National Land Code (Penang And Malacca Titles) Act 1963, ss. 15, 19(1), 21, 27(3), 28(1), 29(1)

Rules of Court 2012, O. 14A r. 1, O. 33 rr. 2, 5, O. 42 r. 13

Rules of the High Court 1980, O. 42 r. 13

For the plaintiff - Kwan Will Sen & Nimalan Devaraja; M/s Skrine
For the 1st defendant - Hadi Muklis; M/s Shook Lin & Bok
For the 2nd & 3rd defendants - Aliza Sulaiman; State Legal Advisor's Office, Pulau Pinang

Reported by Sandra Gabriel

JUDGMENT

Abdul Wahab Mohamed JC:

Introduction

[1] Counsel for both parties by consent agree that the plaintiff's claim be determined pursuant to O. 14A and/or O. 33 rr. 2 and 5 of the Rules of Court 2012 ("RC 2012") and under the inherent jurisdiction of the Court.

[2] Pursuant to O. 14A r. 1 of RC 2012 and/or O. 33 r. 2 of RC 2012, the plaintiff filed an application in encl. [51] for the determination of the following questions of law.

(a) Whether the decision of the Deputy Director of Land Titles, Penang dated 16 April 1998 ("second decision") is final and conclusive with respect to the area of Lot No. 78, Seberang Prai Tengah, Bandar Prai, Pulau Pinang ("the land") and the boundary of the land to be measured based on High Water Mark ("HWM");

(b) Whether the second decision prevails over and/or supersedes the decision of the Deputy Director of Land Titles, Penang dated 10 December 1970 and/or 22 July 1985 (first decision) that the boundary of the land is measured based on Traverse Mark ("TM");

(c) If questions (1) and (2) above are answered in the affirmative:

(i) Whether the plaintiff is the legal, beneficial and registered owner of the land which includes the area measured based on HWM;

(ii) Whether the purported temporary occupational licenses issued by the second defendant to the first defendant are null and void;

(iii) Whether the first defendant is liable for trespass on the land;

(iv) Whether the first defendant ought to vacate that part of the land which is being trespassed on and to repair and/or restore the said part of the land to its original condition prior to the trespass;

(v) Whether the second defendant is to amend the Register of Titles and/or take all necessary steps to reflect that the land is measured based on HWM as shown in Plan No. 5440; and

(vi) Whether the defendants are liable for losses and damages (to be assessed) suffered by the plaintiff.

[3] The grounds in support of the application in encl. 51 were set out therein and they were as follows:

(a) The questions above are suitable for determination for the suit herein without the full trial of the action. This saves time and cost.

(b) The determination of the questions above would finally determine the entire cause or matter or any claim or issue therein.

Cause Papers

[4] The plaintiff filed four affidavits and the first defendant ("TNB") filed one affidavit whereas the second and third defendants ("the State") filed two affidavits. The affidavits filed by the parties and considered by the court are as follows:

(i) Ann Joo's affidavit in support affirmed by Dato' Lim Hong Thye on 24 April 2015;

(ii) The first defendant's ("TNB") affidavit in reply affirmed by Hasline Hussain on 2 July 2015;

(iii) The second and third defendants' affidavit in reply affirmed by Tuan Haji Bakar bin Haji Omar on 19 May 2015;

(iv) the plaintiff's affidavit in reply to TNB's affidavit affirmed by Dato' Lim Hong Thye on 30 September 2015;

(v) the plaintiff's affidavit in reply to the second and third defendant's affidavit by Dato' Lim Hong Thye on 30 September 2015;

(vi) the second and third defendant's second affidavit in reply affirmed by Tuan Haji Akmar bin Haji Omar on 17 December 2015.

(vii) the plaintiff's additional affidavit affirmed by Nimalan a/l Devaraja (plaintiff's counsel) on 3 March 2016.

Plaintiff's Case

[5] In this action, the plaintiff's sought *inter alia*, the following relief:

(i) A declaration that issuance of title by the State Authority to the first defendant granting part of the land measuring 7.22 acres in respect of Lot No . 78 Seberang Perai Tengah, Bandar Perai, Pulau Pinang (said land) is null and void;

(ii) A declaration that the plaintiff holds the legal title to the said land and the boundary of the land is to be measured based on high water mark ("HWM");

(iii) A declaration that first defendant is liable for trespass on the land;

(iv) An order that the first defendant ought to vacate the said land which is being trespassed on and to repair and/or restore the said land to original condition prior to the trespass;

(v) An order that the second defendant is to amend the register of titles and/or to take all necessary steps to reflect that the land is measured based on HWM as shown in Plan No. 5440; and

(vi) An order that the first defendant is liable for losses and damages to be assessed.

Defendant's Case

[6] The first defendant denies the plaintiff's claim and contends that the disputed land was the State land; the plaintiff was never the registered proprietor of the disputed land; the disputed land was alienated to them and further contended that they committed no trespass to the land and never cause any damage to the plaintiff.

Applicable Law

O. 14A r. 1 RC 2012 read as follows:

1. The court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or after at any stage of the proceedings where it appears to the court that:

   (a) such question is suitable for determination without the full trial of the action; and

   (b) such determination will finally determine the entire cause or matter or any claim or issue therein.

O. 33 r. 2 RC 2012

The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

O. 33 r. 5 RC 2012

If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[7] For the application of the O. 14A r. 1 and/or O. 33 r. 2 RC 2012 I am guided by the principles laid down by the Court of Appeal in the case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337, Mohd Noor Ahmad JCA at pp. 351 - 352 said:

> In a nutshell, the order enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action

and such determination will finally determine the entire cause or matter or any claim or issue therein. The Order is new to our civil procedure and hence, the few local decisions of the High Court or the ambit of O.14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent or our O. 14A. In *Korso Finance Establishment Anstalt v. John Wedge* (UNREPORTED, 15 Feb 1994, CA Transcript No. 14/387), the English Court of Appeal laid down the following principles on the ambit of O. 14A:

...

In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question or construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter ...

> The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.

The real question in this case at the end and really crucial one it seems to me is: will the court be able to dispose of the case or the major part of the case or the most significant issue in the case under O. 14A dealing with the matter today. [@ 17C of the Transcript].

Order 33 r. 2 of the RHC states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly fact and partly law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v. Sithambaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, that could conclude the whole proceedings and it would be unnecessary to try the other issues. In *Sl Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1)* [1994] 1 CLJ 207, Lim Beng Choon J, after considering a large number of authorities on the ambit of O. 33 r. 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations:

(a) As a general rule the Court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.

(b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(c) Preliminary points of law have been described as too often of so-called issues of fact, the justification is even harder to discern.

(d) A Preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

Those are the applicable principles to an O. 14A application and to the alternative application made pursuant to O. 33 r. 2. However, the outcome of their applications will depend very much on the facts of each case.

[8] Notwithstanding, the parties consented to this application and the procedural requirements of an application under O. 14A r. 1 of RC 2012 and O 33 r. 2 of RC 2012 are satisfied, this court has discretion whether to entertain the application. I am satisfied that this application is appropriate considering all the material facts relating to the subject matter of claim are undisputed and admitted and furthermore the outcome of this application will dispose off the case entirely. Before considering the application (encl. 51), I peruse and carefully consider all the cause papers filed, including the pleadings and affidavits. This court shall proceed to consider the application.

Background Facts

[9] Before dealing with the important questions of law of which the parties have sought to obtain a determination of this case, it is necessary at the outset, to state briefly the relevant facts, none of which are disputed. The subject matter of the land is 245 acres at No. 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ("Lot 78") was previously owned by Prye (Penang) Syndicate Limited based on the Statutory Land Grant dated 13 October 1950. The plan for the land contained in Plan No. 5440, found in exhibit marked "LHT2" affidavit of plaintiff (encl. 53) showed boundary of land determined on high water mark (HWM).

[10] On 29 January 1962 the plaintiff (formerly known as Malayawata Steel Limited) purchased Lot 78 from Prye (Pulau Pinang) Syndicate limited. In 1962, the Pulau Pinang State Government allowed TNB's predecessor in title, Lembaga Letrik Negara (hereinafter to be known as "LLN") to reclaim 48 acres of land from the sea (ie, The front area of the land) adjacent to Lot 78 for the purpose of building a power station, known as the Prai Power Station and its construction was completed in 1967.

[11] On 10 December 1970, the Pemungut Hasil Tanah Butterworth had determined the boundary of the land based on Traverse Mark (TM) as opposed High Water Mark (HWM). Aggrieved with the decision of the Pemungut Hasil Tanah Butterworth, the plaintiff filed an application to the Director of Land Titles pursuant to s. 28(1) of the National Land Code (Penang and Malacca Titles) Act 1963 ("the Act") for the determination of the boundary of the land (either by way of TM or HWM).

[12] On 22 July 1985, the Deputy Director of Titles, Pulau Pinang dismissed the plaintiff's application and held that the land's boundary is to be determined by TM (first decision) see exh. "LHT6 in the plaintiff's affidavit. The plaintiff then appealed under s. 15 of the Act against the decision of the Deputy Director of Land Titles in respect of the land and the Land Titles Appeal Board (the Board). On 8 December 1988 the Board dismissed the plaintiff's appeal. The written judgment of the chairman of the Board found in the exh. "LHT7" in the plaintiff's affidavit. The Board made observation as follows (see exh. "LHT7" where the main part of the decision:

> Next we must determine whether the Appellant has a right of appeal under section 15. This section specifically excludes such decision of the Commissioner which we deemed to be final.
>
> The Commissioner's order was made at the conclusion of his enquiry under section 28(3) and is in respect of the area and boundaries of the holding in question. Section 27(3) clearly provides that any such order shall be final and conclusive and shall be binding upon all persons having or acquiring any interest therein and their successors in title. We fully agree with counsel for the Respondent and the learned State Legal Advisor that this appeal by the Appellant is caught by section 27(3) as the law does not act in vain. The appellant may have other remedies but not under this provision. Having taken the view that we cannot entertain this appeal, we do not think we should go into the other 2 points except to say that Murad's case appear to be worth looking into for other remedies. We accordingly dismiss this appeal with costs.

[13] Be that as it may, the plaintiff appealed to the High Court against the decision of the Board. This appeal was an appeal on points of law under s. 19 of the Act. The learned judge Tuan T Selventhiranathan (as he then was) of the High Court of Penang had on 22 September 1995 allowed the plaintiff's appeal and ordered the case be remitted to the District Commissioner for Land Titles for an early enquiry be conducted to determine the boundary of the land according to law. A copy of the order is reproduced as found in exh. "LHT8" plaintiff's affidavit (hereinafter referred as "High Court order").

DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG
RAYUAN SIVIL NO: 16-2-88

ANTARA

MALAYAWATA STEEL BERHAD — PERAYU/PLAINTIF

DAN

1. LEMBAGA LETRIK NEGARA — RESPONDEN/
2. COMMISSIONER OF LAND TITLES — DEFENDAN

(DALAM PERKARA LAND TITLES APPEALS BOARD PENANG, TANAH PEGANGAN NO. 78, BANDAR PERAI SEBERANG PERAI TENGAH RAYUAN NO. 8/85)

ANTARA

MALAYAWATA STEEL BERHAD — PERAYU/PLAINTIFF

DAN

1. LEMBAGA LETRIK NEGARA — RESPONDEN/
2. COMMISSIONER OF LAND TITLES — PERAYU

PERINTAH

DI HADAPAN YANG ARIF HAKIM TUAN SELVENTHIRANATHAN

PADA 22 HARIBULAN SEPTEMBER 1995. DALAM MAHKAMAH

TERBUKA

ATAS RAYUAN Malayawata Steel Berhad, Perayu/Plaintiff dalam tindakan ini DAN SETELAH MEMBACA Notis Rayuan Kepada Hakim Dalam Kamar yang bertarikh 24hb Disember, 1987, Ikatan Otoriti pihak Perayu/Plaintif DAN SETELAH MENDENGAR Puan N. Segara, Peguamcara bagi pihak Perayu/Plaintif dan Encik Zahrin bin Ishak, Peguamcara bagi pihak Responden/Defendan Pertama dan Encik Che Mohd. Ruzima bin Ghazali, Peguamcara bagi pihak Responden/Defendan Kedua pada 19hb Januari, 1995, 28hb April, 1995 dan 21hb Julai, 1995 dan ditangguhkan untuk keputusan pada hari ini, 22hb September, 1995 dengan kehadiran Puan N. Segara, Peguamcara bagi pihak perayu/Plaintif dan Encik Zahrin bin Ishak, Peguamcara bagi pihak Responden/Defendan Pertama dan Encik Che' Mohd Ruzima bin Ghazali, peguamcara bagi pihak Responden/Defendan Kedua ADALAH DIPERINTAHKAN PADA HARI INI bahawa Rayuan pihak Perayu/Plaintif dibenarkan DAN ADALAH DIPERINTAHKAN bahawa Mahkamah meremitkan kes ini kepada Persuruhjaya Hakmilik Tanah Daerah untuk menentukan perkara yang sama selaras dengan undang-undang dan satu siasatan yang awal diadakan.

Bertarikh pada 22 haribulan September, 1995.

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Penolong Kanan Pendaftar
Mahkamah Tinggi
Pulau Pinang

Perintah ini difailkan oleh Tetuan Zain & Co., Peguambela & Peguamcara bagi pihak Perayu/Plaintif yang beralamat di tingkat 7, bangunan Dato Zainal, No. 23, Jalan Melaka, 50100 Kuala Lumpur.

[14] Pursuant to the High Court order, on 16 April 1998 after conducting the enquiry, the Deputy Director of Land Titles decided that the boundaries of Lot 78 should be measured in accordance with the High Water Mark (hereinafter referred to as "the second decision").

[15] In the light of the final and conclusive determination of the boundary based on HWM, The plaintiff sought for damages against the first defendant due to TNB's continuing trespass on the land.

A **Submission Of The First Defendant**

[16] I shall first deal with the contention of the first defendant that the second decision is a null and void *ab inito* as at all material times, there was already a decision by the Director of Land titles with the regard to the boundary of the plaintiff's land (*ie*, the first decision of 22 July 1985)

B **Second Decision Is A Nullity**

[17] I shall first deal with the contention of the first defendant. Learned counsel for the first defendant in his submission attempted to impress upon this court that the second decision is a nullity and is void *ab initio* as at all C material times, there was already a decision by the Director of Land titles with regards to the boundary of the plaintiff's land which is final and conclusive. Therefore he contends that the second decision was clearly made in excess of the directors' power and/or jurisdiction in view of the first decision. Thus no appeal on the facts lies against the first decision to the D Board under s. 15 of the Act.

[18] Learned counsel for the first defendant further submitted that the second decision is also a nullity as it was made in contravention of the Act. In this regard, the first defendant contends that the second decision was obtained pursuant to an order of the High Court to remit the determination E of the plaintiff's boundary to the Director of Land Titles following an appeal against the decision of the Board to dismiss the plaintiff's challenge against the first decision. To this, the first defendant submitted that the second decision is a nullity. It is the submission of the first defendant that the plaintiff's appeal against the first decision to the Board was an act of futility F as the Board had no power and/or jurisdiction to entertain an appeal against the decision of the Director of Land Titles is final. First defendant's learned counsel contended that the Board had correctly observed and therefore no appeal can be brought by the plaintiff.

[19] Further, it is the contention of the first defendant that the plaintiff's G appeal against the findings of the Board to the High Court was also in contravention of s. 19 which clearly stipulates that such an appeal shall only be on point of law. The learned counsel heavily relied on the case of the Court of Appeal *Gurcharan Kaur v. Rochi Silk Store* [1959] 1 LNS 31; [1959] 1 MLJ 299.

H **[20]** First defendant further submitted that the High Court had no power and acted in excess of its jurisdiction under the Act when remitted the matter to the Director of Land Titles on the issue of the boundary of Lot 78, which had already been finally determined by the first decision. The plaintiff went on to submit that the High Court is also not seized with jurisdiction "... to I have reversed the first decision" as contended by the plaintiff or at all. The first defendant respectfully submitted further that the same could not fall within the High Court's jurisdiction of deciding an appeal on a point of law under s. 19 of the Act against the decision of the Board.

[21] In support of their submission, counsel for TNB relied on *inter alia* the decision of the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, where he argued that the Federal Court found that the High Court could set aside its earlier order for sale on the grounds that the order for sale was a nullity as it was made in contravention of the Malay Reservation Enactment. In this case, first defendant contends further that the first decision was a final decision (per s. 27(3) and s. 29(1)of the Act) validly made by the Director of Land Titles in accordance with his 'special' statutory powers. They further submit that the case of *Badiaddin* supports *TNB*'s case against the plaintiff's case.

[22] To recollect, counsel for the TNB, pleaded that the High Court order was a nullity and the second decision also a nullity. The first defendant argued that there was no jurisdiction in respect of an appeal that was brought before the High Court to entertain it; and that the High Court was also incompetent to make such an order. The first defendant is inviting me to make a finding that the second decision is a nullity in view that it was made in contravention of the Act. As a reply submission, the first defendant contends that there is no merit in the submission of the plaintiff that TNB is estopped from challenging the second decision and that the doctrine of *res judicata* arises in relation to TNB's challenge against the second decision. The first defendant submitted that an order which was *ultra vires* would not operate in subsequent proceedings as *res judicata*.

Second and Third Defendants ('The State') Submission

[23] Learned counsel for the state submitted that the second decision is defective and not valid in law. The submission is based on the provisions of ss. 27(3) and 29(1) of the Act, where the decision of the Director of Land Titles shall be final and conclusive. Learned counsel for the state argued that the appeal by the plaintiff to the Board contravenes s. 15 of the Act in that, since the first decision was final and therefore no appeal can be filed. They stressed in their submission that, where the decision of the director with regards to the area and boundary of a holding is final and conclusive, no appeal can be made against the decision of the director and there cannot be an appeal under s. 15 of the Act.

[24] It is the contention of the state that the appeal brought by the plaintiff and the decision of the High Court is null and void and has no effect. Learned counsel for the state further agreed that an appeal to the High Court by the plaintiff is contrary to s. 19(1) of the Act on the grounds that one can appeal, only on point of law; an appeal against the decision on boundaries does not involve point of law and the High Court did not at any material time made any decision on the markings of the boundary, only ordered the matter to remit to the Director of Land Titles to hold an enquiry pursuant to 'HWM'

A **Submission Of The Plaintiff**

[25] I shall now deal with the submission of the plaintiff. It is the plaintiff's case that the High Court order dated 22 September 1995 must be taken as final and binding on all parties as there was no appeal filed against and/or application filed to set aside the High Court order. The second decision B prevails over and/or supersedes the first decision as there was no appeal filed against the second decision. Counsel for the plaintiff argued that the defendants are barred by the doctrine of *res judicata* and/or issue stopped from raising this issue in the present proceedings.

C **[26]** The learned counsel for the plaintiff submitted that, in allowing the plaintiff's appeals, the High Court had clearly disagreed with the first decision of the Board and ordered the matter be remitted back to the District Commissioner for Land Titles for an enquiry to be conducted again to determine the boundary of the land. TNB did not appeal against and/or apply to set aside the High Court's order. By failing to do so, TNB must be D bound by the Penang High Court's order and cannot now ignore and attempt to circumvent it by alleging that it is null and void in separate court proceedings. In support of the plaintiff's submission, counsel also relied on the *Badiaddin*'s case, submitted that once a judgment has been perfected, the matter cannot be reopened and further contends that the High Court is also E entitled to the obedience and respect of the order.

[27] As regards to this issue, the plaintiff submitted that since the defendant had taken no steps whatsoever to appeal against and/ or set the Penang High Court's order, but had in fact complied with it to the extent of taking part in the enquiry leading to the second decision, it is unbecoming of the F defendants' to ignore and/or disobey the High Court order now. The plaintiff placed heavy reliance on the judgment of the Federal Court in the case of *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217 where Abdul Hamid Omar LP:

G > It is established law that a person against whom an order of court has been issued is duty bound to obey that or until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

H

[28] It is the plaintiff's case that since TNB never appealed against and/or applied to set aside the High Court's order dated 22 September 1995, the second decision must be valid, effective and binding on all parties and must be taken to have reversed the first decision. Further submitted that there are I no conflicting decision here by the Director of Land Title. The plaintiff concluded their submission by stressing that the second decision is final and conclusive with respect to the land and the boundary of the land is to be measured based on the high water mark and the second decision prevails over the first decision.

Findings Of The Court

[29] This application filed pursuant to O. 14A and/or O. 33 r. 2 and 5 of RC 2012 and under inherent jurisdictions of the court. The threshold requirement of whether is a fit and proper case to be tried under O. 14A and O. 33 r. 2 has been sorted out earlier to proceed the trial in this manner and upon consensus, this application was filed. The parties cannot depart from this. Now, I move on to consider the merits of the questions posed before the court as found in encl. 51.

[30] As regards the questions of law posed for the determination of this court learned counsel for the defendants submitted amongst others that the main issue to be tried in this case depends on whether the High Court order dated 22 September 1995 is a nullity as it was made in contravention of the Act and the second decision obtained pursuant to the High Court order is also a nullity. At the outset, I must say that, none of the defendants filed application to set aside the defective High Court order (as alleged by them). They failed to comply O. 42 r. 13 of the Rules of the High Court 1980 and/or O. 42 r. 13 RC 2012.

O. 42 r. 13 of the RHC 1980

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgement by him

O. 42 r. 13 of the RC 2012 - Setting aside or varying judgment and orders

> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to very such order of judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[31] On this issue, Mohd Azmi FCJ in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 at p. 93 (CLJ); p. 409 (MLJ) at para. I had this to say:

> The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[32] In the present case, the High Court order was drawn up, extracted and accordingly perfected and executed. Looking at the extract of the High Court order (see exh. "LHT8") reproduced earlier, is clear that it was made in open Court before the learned judge Selventhiranathan J (as he then was). It was

made in the presence of all parties. It was not made by default or in the absence of the defendants. The matter was fully adjudicated. There is no indication that when the learned judge Selventhiranathan granted the order on 22 September 1995, he lacked jurisdiction and/or exceeded jurisdiction. Therefore, the questions arose for me were, whether I could set aside the High Court order and the second decision of the Director of Land Titles. For the answer to be affirmative, it is the burden of the defendants to prove that the order is a nullity due to illegality. Otherwise it is the rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered and perfected (see Federal Court case of *Muniandy Thamba Kaundan & Anor. v. Development & Commercial Bank Berhad & Anor.* [1996] 2 CLJ 586; [1996] 1 MLJ 374.

[33] On the strength of all authorities cited by the defendants, the only issue to be determined by me is whether the High Court order could be proved to be null and void on ground of illegality. A convenient starting point is perhaps the judgment of *Badiaddin*'s case. In my judgment, the defendants' application to set aside the High Court order on the ground of nullity should be determined according to the principle of law set out by the Federal Court in the case *Badiaddin Mohd Mahidin*. I consider the judgment of this *Badiaddin*'s case to be very pertinent to my decision. I propose to set out in some detail that part of the three learned judges' judgment dealing with the circumstances, when a court of law can set aside its own earlier order on grounds of illegality or lack of jurisdiction. The *dicta* of all the three judges are referred:

per Mohd Azmi FCJ

> It is of course settled law as laid down by the Federal Court in Hock Hua Bank's case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and void ability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '… which a person affected by the order is entitled to apply to have set aside *ex debit* to justified in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.

per Peh Swee Chin FCJ

> When a judgment in the High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any

appeal, cannot reopen the matter finalized in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v Sahari bin Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation (see *Issac v Robertson* [1985] AC 97; *Pembenaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] l MLJ 100; *Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and Another Appeal* [1994] 2 MLJ 601). It is elementary that a superior court is not any inferior court or statutory tribunal (such as a Land Administrator under the National Land Code 1965 as in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37). It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from Hock Hua Bank v Sahari bin Murid, as mentioned later in this judgment in connection with a consent judgment.

per Gopal Sri Ram JCA (as he then was)

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

[34] So stated, these decisions, which plainly binding precedent, tell against the defendant's contention. I am also of the firm view that there has been no contravention of the Act and as contended by the defendants.

[35] I am also aware that, it is a fundamental principle well established that an order passed by a court without jurisdiction is a nullity, and its validity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution or even in a collateral proceedings. A defect of jurisdiction, strikes at the very authority by the court to pass any order. With respect, on the facts of this case, it is totally wrong submission

by the defendants that the High Court order was passed without jurisdiction. I am of the opinion that learned judge T Selventhiranathan was perfectly competent to entertain the appeal brought by the plaintiff before His Lordship. In this case, the learned judge was competent to hear the appeal, the parties without any objection join issue and went through the appeal upon merits on points of law, the defendant cannot subsequently dispute his jurisdiction upon the ground that he lacks jurisdiction. During the proceedings in the High Court it was never suggested that the court had no jurisdiction to deal with the question until this suit being filed by the plaintiff to enforce their constitutional rights to property as enshrined in art. 13(1) of the Federal Constitution which reads:

> No person shall be deprived of property save in accordance with law

[36] The learned judge T Selventhiranathan (as he then was) ordered that the case be remitted back to the District Commissioner for Land Titles for an early enquiry to be conducted to determine the boundary of the land according to law. This led to the second decision being carried out by the Deputy Director of Land Titles which becomes the central issue for the decision of this court. The question for the court to decide whether the learned judge had the jurisdiction to hear an appeal brought by the plaintiff against the decision of the Board.

Powers Of The High Court

[37] I am fully aware that is well settled law that the court has no jurisdiction to entertain appeal from any statutory tribunal unless such jurisdiction is expressly given to it by statute. Further statute may specifically deal with the power of the High Court in allowing an appeal. Statute may empower the court to make such an order or give such directions as it thinks fit. In the absence of specific provisions in the statute, the court has all the powers of the body appealed from and, in particular, the court may affirm, set aside or vary any order of judgment of the body appeal from and may refer any issue. The National Land Code (Penang and Malacca Titles) Act 1963 ("the Act") expressly given the jurisdiction to entertain an appeal. Under this Act, the right of appeal against the decision of the Board or Director of Land Titles is provided by s. 19(1) of the Act. For the convenience, the provision of the law on procedure of appeal applicable on the date of the decision of the Board are reproduced below:

> Appeals
>
> S. 15 of the Act reads,
>
> Any person who is aggrieved by any decision given by the Director under this Act may, unless such decision relates to a matter in which the decision of the Director is final, within one month there from appeal to the Board by lodging with the secretary to the Board an application in duplicate in form B.

General powers of the Board

S. 16 of the Act reads,

The Board shall have and may exercise the following powers:

a. all the powers conferred on the Director by this Part;

b. power to hear and determine any appeal lodged under section 15 and to make such order thereon as it may think just;

c. power to award costs to parties in proceedings before the Board:

Provided that such costs shall not exceed in any case the cost which would be assessed in respect of such proceedings if they were brought in a Sessions Court.

Appeals on points of law

S. 19 of the Act reads,

(1) An appeal shall lie to the court on a point of law from any decision of the Board.

(2) An appeal under subsection (1) may be brought by any party aggrieved by the decision of the Board, or by the Director, and shall be brought before the Court by means of a notice of appeal lodged within six weeks after the date on which the decision of the Board was made.

(3) the procedure governing appeals to the court under this section shall be the same as for appeals to the Court from decisions of Sessions Courts in civil matters.

Review of orders of the Director and the Board

Section 21 of the Act reads,

A decision or order of the Director on the Board may be reviewed, varied or set aside by the Director or the board, as the case may be, in any of the following cases:

(a) where the decision or order was made in consequence of any fraud, misrepresentation or mistake;

(b) where fresh evidence of a material nature, which could not by the exercise of reasonable diligence have been produced when the decision was given or the order was made, is available;

(c) when the decision or order was made in the absence of any necessary or proper party whose absence was not due to any default or neglect on his part; or

(d) when, in the opinion of the Director or the Board, as the case may be, substantial injustice has been occasioned by the decision or order.

[38] At the outset, I must remind myself that the procedure governing an appeal against the decision of the Board only on point of law and the procedure required to follow is the civil appeal procedure as followed by the Sessions Court which is regulated by the Rules of the High Court 1980 at the material time.

[39] Taking the words of s. 19(1) of the Act, it is clear that an appeal does not lie on a question of fact. It is for the defendants to convince this court that the appeal by the plaintiff in the High Court before Justice T Selventhiranathan did succeed on a point of fact and not on a point of law. There is nothing on records to support their arguments that it was not on point of law.

[40] Further I refer to the case of *Ashbridge Investment v. Minister of Housing* [1965] 3 All ER 371:

> The notion of error of law goes much wider than a mere mistake of statutory interpretation. A minister commits an error of law if *inter alia,* he acts where there is no evidence to support his action or if he comes to consideration to which, on the evidence, he could not reasonably have come.

Points Of Law

[41] It will be appropriate to state that there must be error of law (point of law) complained, to enable the court to invoke s. 19 of the Act. What constitutes error of law was well said in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Worker's Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317, Gopal Sri Ram JCA (as he then was) at p. 765 (CLJ); p. 342 para H (MLJ):

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant consideration (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

[42] It is trite law that a court of competent jurisdiction has both right and duty to decide the case presented before it for adjudication according to the best understanding of law. Such decision is a valid and binding *inter parte*. Since no appeal filed against the decision of the High Court, it does not, therefore stand to reason that the decision of the High Court will be *per se* invalid and inoperative. Surely the High Court would not have entertained the appeal, unless the appeal is on point of law. *Ex facie* the High Court order itself contained words which show that the complaint in the appeal must be point of law. See exh. "LHT8", where the order says:

> an early enquiry be conducted to determine according to law.

[43] The High Court remitted the case to the Director of Land Titles for consideration according to law. Does he has the power to remit? The word 'remit' by itself should be given its ordinary and natural meaning as stated in *Black's Law Dictionary* 8th edn. to mean:

> to send back (a case) to a lower court < the appellate court remitted the case to the trial court for further factual determination"

I am of the view that the High Court has done the right thing by remitting to the Director of Land Titles.

[44] Furthermore, it is my considered opinion that the High Court Judge in considering civil appeals is by way of rehearing ought to have carried out the appeal just like a review. Section 29 of the Courts of Judicature Act 1964 reads:

> All civil appeals from a subordinate court shall be by way of **re-hearing** (emphasis added) and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

[45] Very recently, on 2 August 2016, the Federal Court in Civil Appeal No: 02(f)-82-11-2016(w) *Kabushiki Kaisha Ngu v. Leisure Farm Corporation & Ors* [2016] 8 CLJ 149 in discussing issue on appeal at p. 6 of the unreported judgment held:

> The word "re-hearing" used here clearly anticipates a review or regurgitation before the appeal court of all the points and arguments taken at the court below."

[46] All the foregoing supports my view that the High Court had the jurisdiction in granting such order during the course of an appeal. As I have addressed earlier on the powers of the High Court, the court has all the powers of the body appealed from and in this case, it is the Board. The Board and Director of Land Titles had powers expressly given by s. 21 of the Act that:

> A decision or order of the Director or the Board may be reviewed, varied or set aside by the Director or the Board, as the case may be, in any of the following cases (referred).

[47] This clearly shows the Board and the Director of Land Titles had power to review, vary and even set aside their decisions on the grounds provided under a, b, c and d of s. 21. Even when the decision is made in consequences of mistake or as the case may be, substantial injustice has been occasioned by the decision or order. Therefore, it is not proper to ouster the court's jurisdiction of such power. But the position taken by the Federal Court in the case of *Tenaga Nasional Bhd v. Bandar Nusajaya Development* [2016] 8 CLJ 163 is different with this case. In this case, s. 16(2) of the Electricity Supply Act 1990 says the decision of the State Authority is final and the Federal Court held that the State Authority is prevented from

reviewing, reconsidering or revising its earlier decision. But in that case, in the Electricity Supply Act 1990 the State Authority has no power to review its own decision.

[48] Applying the principles laid by that recent decision of the Federal Court in *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* to this case, the Board and Director of Land Titles under this Act is empowered to review its own decision. Thus, surely the High Court has the same power in exercise of its appellate duty let alone, the supervisory jurisdiction.

[49] In dealing with the power of the court to interfere with the decision of the Board, I refer to the decision Raja Azlan Shah CJ (as he then was) in *Pengarah Tanah Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 at p. 149 para. E:

> The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.
>
> That is the reason for such cases to be remitted to the relevant authority for a fresh consideration and conclusion according to law. In *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment* the case was sent back to the Secretary of State for reconsideration; in *R v. Hillingdon London Borough Council (ante)*; the council was required to reconsider the application for planning permission and reach a conclusion on it according to law. In my opinion the appropriate order would be to remit the case to the Land Executive Committee for reconsideration and reach a conclusion on it according to law.

[50] This case lends support to the decision made by the learned judge as found in exh. "LHT8". This shows he has jurisdiction to make the decision. This cannot be an act of *ultra vires*. The recent Federal Court case of *Tenaga Nasional Berhad v. Bandar Nusajaya Development Sdn Bhd* (unreported judgment) at p. 31 at para. 75 had this to say:

> Judicial pronouncements have always been clear that a court order holds good and is valid until it is set aside.

[51] In view of the above, I hold that this is not an administrative order, but is a court order and therefore cannot be challenged in a collateral proceeding. The defendants had failed to convince this court that the High Court order is a nullity on the ground of illegality. This court cannot set aside an order regularly obtained from another High Court of concurrent jurisdiction. This is an order of a superior court, thus one cannot attack its invalidity laterally by raising an objection to its invalidity in this proceeding for applying to have it set aside first. (see the case of *Badiaddin Mohd Mahidin*)

[52] If it can be proven that the High Court order was on illegality then it can be set aside and the doctrine of *functus officio* will not apply. In this case, since there is no element of illegality involved in granting the High Court order, then the order cannot be set aside as the court is *functus officio*.

Second Decision

[53] The second decision of the Deputy Director of Land Titles is final and conclusive with respect to the area of Lot No. 78 Seberang Prai Tengah, Bandar Prai, Pulau Pinang ("the land") to be measured based on High Water Mark (HWM). Furthermore, the second decision supersedes the first decision.

[54] The Deputy Director of Land titles pursuant to the High Court's order carried an enquiry and came out with decision that the boundaries of Lot No. 78, should be measured in accordance with the high water mark (second decision). Therefore the second decision supersedes the first decision. Since the appeal is allowed, the first decision cannot be enforced. The deputy director in carrying out 'fresh inquiry and in making the second decision had duly observed the High Court order. No one can ignore until and unless it is set aside. Can the Deputy Director of Land titles just ignore the High Court order and carry on enforcing his first decision? The answer is no. He will be facing contempt proceedings. On this issue the statement of Suffian LP in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 at p. 146 para. H provides the correct guideline to administrative officer:

> The order of the court is that the orders of the learned trial judge be set aside and instead there shall be an order that these applications be remitted for reconsideration by the Land Executive Committee in accordance with the law.
>
> What would happen if the Committee were to ignore the order of the court? As to this, I wish to make two observations.
>
> First, in my experience, no Government department or ministry has ever set the courts at defiance. Secondly, it would not be out of place to reproduce the following words from the judgment of the Privy Council at page 28 in *Fischer v. Secretary of State for India in Council* (1898-99) 26 IA 16:
>
> > But then, it was asked, what would happen if the Collector ignored the order of the Court? What remedy would the appellant have if he had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that. But the remedy in such a case, if it did occur, would be simple enough. Every order such as that which the appellant asks for carries with it liberty to apply. On a proper application and on proper notice being given it would be found that the arm of the Court would be long enough to reach the offender, whatever his position might be.

[55] Therefore, the Deputy Director of Land Titles carrying out the enquiry and coming up with the second decision was not made in excess of jurisdiction. The second decision is valid and it was done properly and validly and the Deputy Director of Land Titles had acted within the jurisdiction (as ordered by the High Court) when the second decision was made. Furthermore, in the absence of any appeal by the defendants as to the second decision to the Board, the second decision stands and enjoys full legal effect.

[56] In view of the above, the argument by the plaintiff as to the application of doctrine *estoppel* and *res judicata* has got merits. It is very significance to quote the words of Abdul Hamid Embong FCJ in the recent Federal Court case, *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 in re-examining *Badiaddin bin Mohd Mahidin* at p. 13:

> It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is thus only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction, (see *Badiaddin*'s case).
>
> We have carefully re-examined *Badiaddin* and could not find anywhere in its ratio to say that the court's inherent jurisdiction has an extended scope to correct an earlier regular judgment or order in exceptional circumstances other than where the judgment had been granted in contravention of a statute.
>
> We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that *Badiaddin* to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. This established rule was explained in Tenaga Nasional which we had earlier adverted to. In our view, that part of the holding of the Court of Appeal in Selvam Holdings should not be interpreted as giving the courts a broad power to set aside a previous perfected orders under the guise of 'exceptional cases'. We think that the Badiaddin's phrase 'to intervene and correct a serious defect in the order' should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, *ex debito justitiae* and without the need for file a fresh suit.
>
> As regards the appellant's submission on the court being *functus officio* and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 which we think has settled these issues.

[57] In *CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] [2014] 9 CLJ 1012; [2014] 6 MLJ 779 at p. 790, the Federal Court per Jeffrey Tan FCJ, delivering the judgement of the court, in examining the *Badiaddin*'s case held that: para. 13

> The inherent jurisdiction to set aside, *ex debito justitia*e, orders regularly obtained is settled. Unless the order is a nullity in the sense as enunciated in *Badiaddin*, it could not be attacked in collateral proceedings.

Conclusion

[58] In the final analysis, my answer to the Q1 and Q2 as stated in para. 2 of my judgment must be answered in the affirmation for the reasons elaborated above. As questions 1 and 2 answered in the affirmative, it naturally follows that questions 3 must also be answered in the affirmative.

[59] Following from the above, the plaintiff's prayed for judgment to be entered against the defendants and I order as follows:

(a) Ann Joo is to be registered beneficial owner and/or legal title of the land measured up to the boundary of HWM;

(b) The temporary occupational licences issued by the second defendant to the first defendant is null and void;

(c) Tenaga Nasional Berhad is liable for trespass to the plaintiff and damage to be assessed;

(d) Plaintiff is entitled to vacant possession of the disputed area;

(e) The second defendant is required to amend the issue document of title of the plaintiff's land to reflect of the boundary to high water mark; and

(f) Costs of RM80,000 to be paid by the defendants to the plaintiff.